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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 412

ANGELO INCISO,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Angelo Inciso, respectfully prays that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit in the case of United States of America, Plaintiff-Appellee v. Angelo Inciso, Defendant-Appellant, No. 13058.

OPINION AND JUDGMENT DELIVERED IN THE COURTS BELOW.

Indicted for a statutory misdemeanor, provided for in § 302 (b) of the Labor-Management Relations Act of 1947, coupled with 18 U.S.C.A. § 2 (b), Inciso, defendant below, was sentenced, after a jury's verdict of guilty, to

imprisonment for a period of one (1) year on each of the 22 Counts; consecutive sentences were imposed on the first 10 Counts and the sentences on Counts 11 to 22, both inclusive and to run concurrently with each other and concurrently with the sentence given on Count 10. Inciso was also fined $1,000 on each one of the 22 Counts—these fines were cumulated in the sum of $22,000.00. In short, Inciso was sentenced to 10 years imprisonment and fined $22,000 for a misdemeanor.

This judgment was entered June 23, 1960, in the United States District Court for the Northern District of Illinois.

On June 30, 1961 that judgment was affirmed in an unreported opinion handed down by the United States Court of Appeals for the Seventh Circuit. The Opinion is appended to this Petition and contained in the certified record.

Petition for rehearing was denied on August 17, 1961. On August 23, 1961, the mandate of the United States Court of Appeals was stayed for thirty days.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. (a) Since the defendant elected not to testify in his own behalf, have his rights under the United States Constitution, Amendments 5, 6 and 8, and Section 3481 of Title 18, United States Code, been invaded, when the prosecution was permitted to read to the trial jury in its case in chief, under the guise of "admissions against interest" and "false, exculpatory statements", purported testimony given by the defendant before a Committee of

the United States Senate, when the record is clear that none of the employers named in the indictment were mentioned by name in that Senate testimony?

(b) Was not the error thereof compounded by the prosecutor in summation repeatedly telling the jury, with reference to this Senate testimony, Inciso "lied"; "these statements are not true"; "he lied"; he, Inciso, was "lying his head off"; "he lied, and he lied all the way through"; "the only person whom it suggest (*sic*) it is conclusively proven has lied at all in Inciso. He is the liar."

(c) Was not the total effect thereof to place the defendant on trial for perjury, rather than the statutory misdemeanor?

2. If moneys were received by Local 286 from several different and unrelated employers, named in the indictment, is the unit of prosecution under § 302 of the Labor-Management Relations Act of 1947 (61 Stat. 157, 29 U.S.C. § 186) the failure to have one master trust fund or does each employer's aggregate payments constitute separate, and, at bar, 22 units of prosecution?

3. Does the number of employers who allegedly paid moneys to Local 286 determine the units of prosecution or, more soundly, isn't the unit of prosecution the single impulse which resulted in the alleged failure to set up a statutory trust fund under § 302?

4. Since neither the wording of § 302 of the Act nor its legislative history points clearly to whether a single trust fund is required without regard to the number of employers allegedly paying moneys to Local 286, or whether payments from employers absent any statutory trust fund, constitutes separate offenses as to each such employer, is then this that circumstance when this Court applies a policy of lenity and adopts the less harsh mean-

ing, *e.g.*, the crime, if any, is the single failure to have established a statutory trust fund.

5. Whether there being a plain showing of gross abuse of discretion by the trial court in assigning punishment against Inciso, the Court of Appeals has so far sanctioned the district court's departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision?

6. Does § 302 (b) and (d) of the Labor-Management Relations Act of 1947 (61 Stat. 157, 29 U.S.C.A. § 186 (b)) authorize the quantum of punishment imposed on this petitioner?

7. Whether imprisonment for one year on each of 22 Counts, sentences Counts 1 to 10 running consecutive, and the sentences on Counts 11 through 22 running concurrently with Count 10, and each other, together with a $22,000.00 fine, for a misdemeanor under § 302 (d) of the Act, are wholly disproportionate to the failure to set up a statutory trust fund under § 302 (c) (5) of the Act?

8. Whether the indictment was wholly and fatally defective because of the failure to allege that Inciso was a "representative" within the meaning and purport of § 302 (b) of the Labor-Management Relations Act of 1947?

9. Whether, under the evidentiary setting of this case in the District Court, it was reversible error for the trial judge to refuse to give either of the following instructions:

(a) "Section 186(a) of the statute here in question makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

During the trial many employer witnesses testified in behalf of the Government in this case that they

had paid the amounts or part of the amounts of money which are the subject of the respective counts of the indictment in connection with which these witnesses were called. These employer witnesses are shown by the evidence not to have been indicted or otherwise proceeded against for the acts about which they testified.

"You may take these facts into consideration when considering your verdict and in weighing the testimony of those employer witnesses and in deciding the credibility which should be attached to their testimony. It is for you to determine whether these respective employer witnesses have received any reward or immunity from prosecution, and if you believe that any of these employer witnesses have received any such reward or immunity from prosecution, or hoped or believed that he had obtained or would obtain any such reward or immunity from prosecution, you may consider that fact when weighing the testimony of the respective employer witnesses." (D-24, App. 338)

(b) "Section 186(a) of the statute here in question makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

There is evidence in this trial that none of the employer witnesses who testified for the Government in this case have been indicted or otherwise proceeded against for any violation of the foregoing statute.

You may take that fact into consideration when considering your verdict and in weighing the testimony of those employer witnesses and in deciding the credibility which should be attached to their testimony. The motive of the witnesses in testifying is always important and if you believe that any witness has testified because of any hope or promise of im-